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No. 95-1514

In the Supreme Court of the United States

OCTOBER TERM, 1995

CALIFORNIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's preemption of a California rule governing calling number identification (caller ID) service for nonpublished telephone subscribers effects an impermissible intrusion upon the prerogatives of the State.

2. Whether the Commission's preemption of the California rule violates the privacy and free speech rights of California telephone subscribers.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 75 F.3d 1350.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1996. The petition for a writ of certiorari was filed on April 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Calling number identification (caller ID) service permits a telephone customer who receives a call to see, with the aid of a display device attached to or incorporated into its telephone, the telephone number

of the person who placed the call. Caller ID service is made possible by the refinement of techniques for the transmission of the calling party number (CPN) during the setup of calls, both local and long-distance.[1] In a rulemaking proceeding to develop rules and policies for the implementation of caller ID and related services nationwide, the Federal Communications Commission (FCC or Commission) adopted the orders at issue in this case. In those orders, the Commission, *inter alia*, established procedures by which telephone subscribers may choose *not* to have their CPN transmitted to the parties they call. Those procedures, which seek to balance the often conflicting privacy interests of called and calling parties, generally favor the transmission of CPN in the absence of a deliberate and conscious choice by the calling party not to have its CPN transmitted.[2]

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[1] Those refinements in the transmission of CPN permit a wide variety of benefits to consumers in addition to caller ID service. For example, businesses can significantly expedite customers' orders or inquiries via computer programs that instantly retrieve the caller's name, address, and billing information. Customer calls to national business or non-profit centers can be transferred immediately to the local branch office most convenient to the caller. Ambulances can be dispatched more quickly. In general, the public can benefit from a variety of CPN-based services that allow individuals to obtain information and transact business more quickly and accurately. See Pet. App. A39.

[2] The Commission in its notice of proposed rulemaking initiating the caller ID proceeding identified privacy interests of both the called party and the calling party and announced its intention to balance those interests in formulating a federal policy or rule. See *Rules and Policies Regarding Calling Number Identification Service*, Notice of Proposed Rulemaking, 6 FCC Rcd 6752, 6755-6757 (1991).

Because CPN information automatically enters the telephone network during the call setup process, a choice by the calling party not to have its CPN revealed to the called party requires some method of blocking the CPN before it can reach the called party's display device. "Per call blocking," which presupposes that CPN will be transmitted as a general rule, allows a calling party to block disclosure of its CPN on any particular call by dialing certain numbers (*67) before placing the call. "Per line blocking," by contrast, presupposes that as a general rule CPN will not be disclosed. Under that system, disclosure of a calling party's CPN is blocked on all calls from its telephone line unless the caller dials certain numbers (*82) to countermand the blocking before placing an individual call. See Pet. App. A57-A66. As an accommodation to States that had adopted per line blocking procedures for intrastate calls, the FCC's policy permits customers to choose either per call blocking or per line blocking so long as the methods for overriding per line blocking are uniform.[3]

The narrow dispute in this case concerns the form of blocking that applies, as a "default" mechanism, when subscribers to telephone service with unpublished numbers have not chosen either per call block-

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[3] Existing technology does not permit per line blocking for intrastate calls and per call blocking for interstate calls on the same line. The Commission at first considered preempting any state regulation that would have permitted per line blocking. On further consideration, the Commission decided to accommodate the per line blocking policies that a number of States had adopted, as long as the carriers offering per line blocking also offered callers a means of unblocking the passage of CPN on individual calls by dialing a set of numbers that would be uniform nationwide. See Pet. App. A87, A132-A135.

ing or per line blocking. The FCC's rules and policies for interstate caller ID require that CPN should be transmitted unless the calling party has made an affirmative choice to block it, either by selecting per line blocking or by dialing the appropriate prefatory numbers to block transmission of CPN on an individual call. That FCC policy choice can be effectuated only if per call blocking is used as the default mechanism for subscribers who have not chosen either of the two options.

California's rules governing intrastate offerings of caller ID employ a contrary default policy for a narrow category of subscribers. Under California's rules, customers with unpublished numbers who do not choose a method of blocking would be given per line blocking. The Commission in this case preempted California's default blocking rule for unpublished numbers to avoid frustration of its own federal policies for interstate caller ID and the balance those policies had achieved among the competing privacy interests of calling and called parties. See Pet. App. A135-A144. California challenged the Commission's preemption order by filing a petition for review in the United States Court of Appeals for the Ninth Circuit.[4]

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[4] Caller ID is not yet available in California, although it is offered in some form in 47 States and the District of Columbia. The dispute over customer education programs and blocking procedures between California and the carriers offering telephone service in that State has delayed the implementation of this valuable service both as an intrastate service in California and as a part of the interstate service offered elsewhere under the FCC's rules and policies. Pet. App. A137-A138 (quoted at Pet. App. A19-A20).

2. The court of appeals denied the petition for review. Pet. App. A1-A32. The court first held that the Commission had not impermissibly intruded upon the State's authority in preempting the California regulation. The court pointed out that the FCC had "narrowly tailored" its preemption to fit federal policies, and that it had exercised its discretion reasonably by considering relevant factors and by referring to support in the record. *Id.* at A21. The court recognized that, while the FCC is generally precluded from regulating intrastate communications, see *id.* at A17-A18, an exception to that general rule permits preemption of state law "where it is 'not possible to separate the interstate and intrastate components of the asserted FCC regulation,'" *id.* at A18 (quoting *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 375 n.4 (1986)). On the basis of the Commission's uncontested determination that it was infeasible to establish different blocking schemes for interstate and intrastate calls that originate from the same line, see Pet. App. A14 & n.11, the court concluded that the FCC's preemption of California law fit within that "impossibility exception," *id.* at A21.

The court of appeals also rejected petitioners' contention that the Commission's preemption order violated the privacy and free speech rights of California telephone subscribers. The court held that a calling party's telephone number "is not among the select privacy interests protected by a federal constitutional right to privacy." Pet. App. A23. Relying on decisions of this Court and three state supreme courts, the court of appeals concluded that the FCC's preemption rule "does not violate any cognizable privacy interest." *Id.* at A24. The court held that the FCC's rule does not violate a First Amendment "right not to

speak" because it does not require callers to express adherence to an unacceptable point of view. *Id.* at A24-A25. The court also concluded that the FCC's rule "does not compel disclosure of the identity of a person who exercises his or her freedom of expression" and thus does not violate any constitutional "right to speak anonymously." *Id.* at A26.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court. Nor is the issue one of recurring importance; to the contrary, petitioners themselves assert (Pet. 9) that "the Court is unlikely to see these issues again under any circumstances" because "California is the only state in the country to have adopted a per line blocking default for nonpublished customers." Further review is not warranted.

1. Petitioners first contend (Pet. 10-13) that the Commission's preemption of California law effects an impermissible intrusion on the sovereignty of the State. Relying on well-established precedent with respect to telephone regulation, the court of appeals recognized that the FCC is empowered to preempt state law where the interstate and intrastate aspects of the Commission's regulatory scheme cannot be separated. Pet. App. A18 (citing *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 375 n.4 (1986)). Cf. *City of New York* v. *FCC*, 486 U.S. 57 (1988) (upholding FCC preemption of technical standard for the transmission of cable television signals). The courts of appeals have applied that rule consistently, upholding FCC preemption of state regulations where valid federal interstate regulations cannot coexist with state regulations that purport to address only

intrastate matters. See, *e.g.*, *Illinois Bell Tel. Co.* v. *FCC*, 883 F.2d 104, 113-116 (D.C. Cir. 1989); *California* v. *FCC*, 39 F.3d 919, 931-933 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427 (1995). The Commission explained in the order under review that "it is not feasible to have different [caller ID] default policies for interstate and intrastate calls." Pet. App. A136; see *id.* at A125. Petitioners have not contested that determination either in this Court or in the court of appeals. See Pet. 12; Pet. App. A14 n.11. There is consequently no merit to petitioners' contention that the FCC's preemption of California law transgresses principles of state sovereignty. See *id.* at A21; *City of New York* v. *FCC*, 486 U.S. at 63-64.[5]

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[5] Petitioners' contention (Pet. 10) that the FCC "ignored principles of federalism" is particularly ill-founded in light of the fact that the Commission narrowly tailored its preemption decision to accommodate the regulations established by the 47 other States that have implemented caller ID and various CPN-blocking regimes, and acquiesced in all but one of California's own rules. See Pet. App. A21 (noting that "the FCC substantially narrowed the scope of its preemption order" in its order upon reconsideration, and concluding that "[t]he FCC's preemption order satisfies the requirement that a preemption rule should be narrowly tailored to fit federal policies").

There is no basis for petitioners' suggestion (Pet. 10-11) that the court of appeals' decision conflicts with the Ninth Circuit's prior holding in *Air Transport Ass'n* v. *Public Utils. Comm'n of California*, 833 F.2d 200 (1987), cert. denied, 487 U.S. 1236 (1988). The court of appeals in that case held that a California statute requiring telephone carriers to discontinue service to customers found to have violated a state rule prohibiting call monitoring was not preempted by a provision of the Communications Act prohibiting discriminatory discontinuation of service. The case did not present any question concerning the FCC's authority to preempt a state rule that the Commission determines will undermine the federal regulatory scheme.

Petitioners also contend that preemption of state law is inappropriate here because the federal interests that would be threatened by California's default rule are "de minimis." Pet. 12. The Commission determined, however, that California's unique default policy would undermine two valid federal objectives: 1) fostering the availability of caller ID and other CPN-based services on interstate calls to and from California, and 2) promoting consumer choice as reflected in the Commission's carefully considered balance of the interests of the calling party in retaining the option to block CPN and the interests of the called party in receiving CPN absent the exercise of the caller's option. On the first point, the FCC cited record evidence suggesting that California's default policy was preventing deployment of caller ID and related services in California, thereby depriving all residents of and recipients of calls from that State of the benefits associated with the service. Pet. App. A136.[6] As to the second point, the FCC "determined that as a matter of federal policy, the called party should have access to incoming CPN unless the calling party has exercised his right not to have his

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[6] The court of appeals pointed out that some form of caller ID service was available in 47 States and the District of Columbia, but not in California. Pet. App. A11. Petitioners' contention (Pet. 11) that 93 percent of all calls made in California are intrastate provides no support for their contention that the impact of the California default rule upon federal policy would be de minimis. See *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977) (fact that telephone terminal equipment was used 97 percent of time for intrastate calls did not deprive FCC of authority to preempt state regulation that would defeat valid federal regulatory purpose).

CPN revealed." *Id.* at A139. California's default policy would upset that balance, depriving the called party of the benefits of caller ID even though the calling party had made no affirmative choice to block transmission of its CPN. The court of appeals considered the Commission's proffered justifications, see *id.* at A19-A21, and upheld its preemption regulation, observing that "[t]he FCC's preemption order satisfies the requirement that a preemption rule should be narrowly tailored to fit federal policies," *id.* at A21. That holding was correct and does not warrant this Court's review.

2. There is also no merit to petitioners' contention (Pet. 13-18) that the FCC's preemption order violates the constitutional privacy and free speech rights of California nonpublished subscribers.[7] The court of appeals correctly recognized that "[a] phone number is not among the select privacy interests protected by a federal constitutional right to privacy." Pet. App. A23. The court relied in substantial measure (see *id.* at A23-A24) on this Court's holding in *Smith* v. *Maryland*, 442 U.S. 735 (1979), that an individual has no Fourth Amendment right to prevent the disclosure of telephone numbers dialed from his home telephone. Since the advent of caller ID, two state supreme courts have relied on *Smith* in ruling that there is no federal constitutional right to privacy offering protection from disclosure of telephone numbers via

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[7] Petitioners' argument presumably would suggest that the 47 other States (and the District of Columbia) in which caller ID is available (see Pet. App. 11) are similarly violating the Constitution, since "California is the only state in the country to have adopted a per line blocking default for nonpublished customers" (Pet. 9).

caller ID. See *Ohio Domestic Violence Network* v. *Public Utils. Comm'n of Ohio*, 638 N.E.2d 1012, 1019 (Ohio 1994); *Southern Bell Telephone & Telegraph Co.* v. *Hamm*, 409 S.E.2d 775 (S.C. 1991). Another state supreme court has held that no federal constitutional privacy right prevents disclosure of an unlisted telephone number. *Saldana* v. *State*, 846 P.2d 604, 611-612 (Wyo. 1993). Petitioners do not cite or discuss those state cases, nor do they identify any court that has reached a contrary result.

Even if telephone subscribers possessed a constitutional right to prevent transmission of their telephone numbers to the parties they call, moreover, the FCC policy at issue here would not violate that right. Any caller can prevent disclosure of its telephone number via caller ID, either by choosing per line blocking or by dialing the appropriate prefatory numbers to block transmission of its CPN on individual calls. Failure to utilize either of those options effects a waiver of any conceivable right to prevent disclosure of CPN.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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